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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA AND ARMET, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE AMERICAN TELESERVICES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN TELESERVICES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The American Teleservices Association ("ATA"), founded in 1983, is the not-for-profit trade association of the teleservices industry representing the interests of teleservice

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[1] In accordance with Rule 37.6 of the Court, counsel represents that no part of this brief was authored by counsel for a party, and no person or entity other than ATA and its members made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

providers and users in the United States. ATA has more than 2,500 members, which include telemarketing service agencies, consultants, customer service trainers, and other service providers. ATA's members also include users of teleservices, including advertisers, retailers, catalogers, manufacturers, financial service providers, and non-profit organizations.

ATA represents the interests of its members in the lawmaking arena and educates its members, policymakers and the general public on the legal, ethical and professional deployment of teleservices. Not only must ATA members comply with existing federal and state laws governing telemarketing, they also adhere to a strict ethical code governing their practices. The application for membership in ATA requires applicants to sign a statement that they have read and will comply with the ATA Code of Ethics ("ATA Code"). The ATA Code demands that telemarketers keep apprised of and comply with all applicable laws – federal, state, local – and their implementing regulations. It requires that, prior to placing a single call, a telemarketer must receive adequate training in professional telemarketing, recognized procedures and proper etiquette. The ATA Code further requires all solicitations to be stated clearly and honestly, so both parties know the precise terms of the transaction. The Code prohibits unprofessional and dishonest claims which are untrue, misleading, deceptive, fraudulent or unjustly disparaging of competitors.

This case is of particular interest to ATA and its members because the State of Illinois is seeking to undermine existing precedent and to impose special legal obligations and diminished constitutional protection on professional telemarketers that assist with charitable solicitations. Although this Court has held that for-profit solicitors are

fully protected by the First Amendment and that the government cannot use the percentage of proceeds spent on administration as the test for fraud, the state is seeking to reduce the level of constitutional scrutiny and to allow just such a percentage-based presumption.

Significantly, the effort to roll back this Court's holdings on solicitation is not confined to the State of Illinois. A majority of the states support Illinois' argument to subvert established law, as does the federal government.[2] Most notably, the federal amici are asking this Court to adopt a new constitutional standard to bless federal rules that subject for-profit telemarketers to more burdensome regulations than apply to their non-profit counterparts. *See* Fed. Br. at 2. The new rules, announced December 18, 2002 but not yet in effect, modify FTC rules governing telemarketing. Among other things, the rules – which apply to for-profit telemarketers but not the charities they represent – prohibit misrepresenting "directly or by implication" the "purpose for which any charitable contribution will be used" or the "percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program."[3] Ultimately, the supporting amici, like the petitioner, are asking this Court to adopt a new constitutional rule that accords professional solicitors a lower level of First

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[2] *See generally* Br. of the States of Florida, et al., ("State Br."); Br. for the United States and the Federal Trade Commission ("Fed. Br.").

[3] 16 C.F.R. § 310.3(d)(3). Federal amici's quotations of the rules are inaccurate, perhaps because they relied on a proposed version of the new rules, and not the regulations as ultimately announced by the FTC. *Compare id.* with Fed. Br. at 2. The new rules were released by the FTC on December 18, 2002 but have not yet been published in the Federal Register.

Amendment protection and effectively compels the disclosure of the percentage of receipts devoted to charitable programs.

The interest of amicus ATA is the same as that of the petitioner and its supporting amici – to ensure honest solicitations through telemarketing practices that conform to the highest professional standards. But, unlike petitioner and its supporters, ATA believes it is vitally important that this Court "keep[] the starch in the standards" in applying First Amendment protections to telemarketing activities. *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring). Any other answer would allow governments at all levels to use their unbounded discretion to restrict speech that traditionally has been protected by this Court.[4]

STATEMENT

This case does not involve allegations that a professional fundraiser "made affirmative misstatements to potential donors." *Ryan v. Telemarketing Assoc., Inc.*, 198 Ill.2d 345, 348 (Ill. 2001). Rather, the Illinois Attorney General based his charges on the fact that respondent Telemarketing Associates "retained 85% of charitable funds collected on behalf of a charity * * * and, when soliciting, failed to inform donors that only 15% of their contribution would be distributed to the charity." *Id.* at 347. According to the complaint, the arrangement constituted common law fraud and violated Illinois law governing charitable solicitations

[4]It is not ATA's intention here to endorse the specific contracts between Telemarketing Associates and VietNow. Rather, it is to reaffirm the well-established principle that the government may not presume fraud based on the fee arrangement between a charity and a professional fundraiser.

because "the fees charged by defendants for conducting solicitation were 'excessive in amount and an unreasonable use and waste of charitable assets,' and because defendants did not advise donors that only 15% of the funds raised would be turned over to VietNow." *Id.* at 349. Given the amount of the fee, Illinois claimed that the failure to disclose the arrangement rendered the solicitation "knowingly deceptive and materially false." *Id.* The Attorney General alleged that the arrangement amounted to "constructive fraud" on the theory that "retention of 85% of donated funds goes well beyond any reasonable expectation of the public." *Id.* at 351-352.

Throughout the proceedings below, there has never been an allegation that Telemarketing Associates failed to honestly and faithfully carry out the terms of its contract. *Id.* at 348. Nor has there ever been a suggestion that respondents failed to turn over the funds it collected for charitable purposes pursuant to the agreement.[5] In addition to collecting funds, the contract required Telemarketing Associates to "promote goodwill" for the charity, "enhance good public relations through [its] sales techniques, and "increas[e] public awareness and financial support for the organization." Under the terms of the agreement, respondent was required to publish annually an advertiser-supported magazine to distribute VietNow's message. Pet. Br. 4. The Illinois Supreme Court found that Telemarketing Associates did what it was hired to do, and that VietNow was satisfied with the fundraiser's performance. *Telemarketing Assoc.*, 198 Ill. 2d at 348.

[5]Petitioner acknowledges that respondents provided over $1 million in donations to VietNow, and that this was the amount specified in the fundraising contracts. Pet. Br. 2, 3. *See Telemarketing Assoc.*, 198 Ill. 2d at 348.

Against this background, the circuit court, court of appeals, and Supreme Court of Illinois all held that the state's allegations of fraud against Telemarketing Associates are barred by the First Amendment pursuant to this Court's holdings in *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), *Secretary of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984) and *Village of Schaumburg v. Citizens For A Better Env't*, 444 U.S. 620, 636-637 (1980).

SUMMARY OF ARGUMENT

The question presented in this case is not, as petitioner has framed it, whether "misrepresentations" of fact are protected by the First Amendment. Rather, it is whether there are limits to the government's ability to label speech as "fraudulent" in an attempt to divest a speaker of constitutional protection. Here, the state claims that respondent's speech is unprotected because it is "deceptive," but reaches this conclusion only by assuming the truth of its allegations and by labeling the result "constructive fraud." Cutting through petitioner's rhetoric, the state's argument rests on the assumption that a for-profit fundraiser's failure to disclose high fundraising costs is inherently deceptive.

A fatal problem with respondent's position is that it flies in the face of well-established precedent of this Court and of the lower courts. In a body of case law that extends to the 1930s, this Court has applied First Amendment protection to various forms of solicitation, and in recent years has specifically held that professional fundraisers receive full constitutional protection. In particular, this Court's precedents make clear that the government cannot regulate the amount of charitable proceeds that can be devoted to fundraising expenses and that solicitors cannot be compelled to disclose the amount of their

expenses. Any such requirements necessarily restrict First Amendment activity.

From the beginning of this case, the State of Illinois has focused almost exclusively on the amount of the fee retained by Telemarketing Associates. Because of the amount of its compensation (measured as a percentage of total contributions), the state alleged that Telemarketing Associates engaged in "implied misrepresentation" to the extent it failed to disclose its fee to potential donors. In short, petitioner is seeking to impose a Hobson's choice on professional fundraisers. Those with fees that are "too high" by some undefined standard acquire an obligation to disclose the proportion of proceeds devoted to fundraising, or else they face allegations of fraud.

This Court has held that the First Amendment prohibits direct regulation of professional fundraising to achieve such an objective. For the same reasons, the Constitution bars state and local governments from imposing the same restrictions on speech indirectly, through the threat of fraud prosecutions. This Court has been quite clear in its holdings that there is no relationship between high solicitation expenses and state concerns about preventing fraud. Many factors explain the cost of charitable solicitations, including the size and popularity of the cause, the need to use professional solicitors, and the desire to achieve educational and other long-range objectives. Additionally, the cases hold any legal requirement that compels a charity to disclose its fundraising expenses would violate the First Amendment. Among other reasons, such a mandate discriminates between charities that use volunteers and those that use professional solicitors.

These well established constitutional principles apply fully to petitioner's attempt to target solicitors using a case-by-case approach. It is not the form in which state action is applied that leads to the constitutional violation; it is the attempt to create a substantive rule that is in conflict with established law. In this instance, the state is seeking to use its prosecutorial power to undermine the rules regarding charitable solicitations. In addition, petitioner is seeking to reduce the level of constitutional protection accorded to professional solicitors as compared to their non-profit counterparts. Its argument plainly contradicts the bedrock rule that a speaker does not lose constitutional immunity because he or she was paid to speak.

At base, petitioner is asking this Court to approve a standard that would give it unbounded discretion to prosecute disfavored charities for fraud any time the attorney general believes its solicitation expenses are "too high." Rather than attempting to specify what solicitation fee is "reasonable," the state seeks authority to prosecute based on "what the public reasonably understands" about the sufficiency of the fee. The state asserts that an implied misrepresentation could be predicated on "almost infinite variations of human language," thus creating for itself virtually unbounded discretion to prosecute disfavored causes. Such a standard will weigh most heavily on unpopular charities that historically have had higher solicitation fees. Such a standard would significantly chill protected speech by creating a *de facto* disclosure requirement for any solicitor whose fees risk being considered "too high" by the state.

ARGUMENT

I. ILLINOIS IS SEEKING TO EVADE WELL-ESTABLISHED FIRST AMENDMENT LIMITS ON STATE REGULATION OF SOLICITATIONS

The State of Illinois prosecuted Telemarketing Associates under the Illinois Solicitation for Charity Act and the Uniform Deceptive Trade Practices Act in essence because the respondent did not affirmatively disclose to prospective donors the percentage of contributions devoted to administration and fundraising costs. In short, petitioner is asking this Court to rule that the government constitutionally may impose a legal requirement that (1) a professional fundraiser's fee cannot be "too high," and (2) failure to affirmatively disclose the amount of the fee to potential donors constitutes "constructive fraud."

While the state appears to admit that either of these rules is plainly unconstitutional if imposed directly by ordinance or state law, Pet. Br. at 41, it maintains that essentially the same standards may be applied case-by-case through individual prosecutions. However, if this Court accepts petitioner's argument, the effect would be to approve a semantic distinction that would undo decades of First Amendment jurisprudence governing solicitations.[6]

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[6]The state amici quite candidly ask this Court to reconsider its holding in *Riley*, State Br. 13, thus revealing the incompatibility between their position and established law.

A. Courts Consistently Have Blocked Efforts By State and Local Governments to Restrict Solicitation Campaigns

As long as there have been residential solicitations, whether charitable or otherwise, the government has sought to regulate them.[7] However, beginning in the 1930s, when this Court was first developing its First Amendment jurisprudence, and continuing into the 1980s, after constitutional immunity was extended to commercial speakers, this Court consistently has issued decisions protecting speech "even though it is in the form of * * * a solicitation to pay or contribute money." *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977), citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In doing so, this Court forged two strong principles: (1) the government cannot regulate the amount of charitable proceeds that can be spent on professional fundraising efforts, and (2) the law cannot require solicitors to disclose the percentage of their proceeds expended on fundraising. *Riley*, 487 U.S. at 789-794, 797-798; *Munson*, 467 U.S. at 961, 965-70; *Schaumburg*, 444 U.S. at 636-637.

Strong reasons support these rules. As explained in *Schaumburg*, 444 U.S. at 632, charitable appeals are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views." Indeed, as is the case here, the typical

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[7] *See, e.g., Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Jamison v. Texas*, 318 U.S. 413 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Thomas v. Collins*, 323 U.S. 516 (1945); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

contract calls for more than simply collecting and delivering proceeds for a particular cause. Such arrangements entail formulating and delivering the charity's message, increasing public awareness of important issues, and promoting good will. *See Riley*, 487 U.S. at 792 ("a solicitation may be designed to sacrifice short-term gains in order to achieve long-term, collateral, or noncash benefits"). Consequently, it is bedrock law that "a percentage limitation on fundraising *necessarily* restricts protected First Amendment activity." *Munson*, 467 U.S. at 965 n.13 (emphasis added); *see id* at 967 n.16 ("the percentage limitation is a direct restriction on the amount of money a charity can spend on fundraising activity").

Petitioner's denial of any intent to impose a percentage limit on solicitation expenses and the claim that its only purpose is to combat "fraud" is belied by the history of this case and the state's singular fixation on the amount of respondent's fee. The complaint below focused almost exclusively on the percentage of fees retained by Telemarketing Associates, and that amount is recited repeatedly in petitioner's brief.[8] In this regard, the state's asserted interest in preventing fraud does not distinguish it from past cases, for this Court has expressly rejected the proposition that "there is an element of 'fraud' in a professional fundraiser's soliciting money for a charity if a high proportion of those funds are expended in fundraising." *Munson*, 467 U.S. at 968 n.16 (quoting *id.* at 980 (Rehnquist,

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[8] *See* Pet. Br. at 2, 4, 5, 6, 7, 9, 12, 44, 45, 48. The amount of the fee is the central concern of supporting amici, as well. *See, e.g.*, State Br. 12 (once it is established that 85 or 90 percent of the donation will not be spent on program services, "[h]ow that portion of the donation is in fact spent is *irrelevant*") (emphasis in original).

J., dissenting)). The Court has described as "fundamentally mistaken" the premise "that high solicitation costs are an accurate measure of fraud," because "[t]he percentage limitation is too imprecise a tool" to be consistent with the First Amendment. *Munson* 467 U.S. at 966 & 967 n.14. Simply put, "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." *Riley*, 487 U.S. at 793. As a result, this Court struck down a 25 percent limit on fundraising expenses in *Schaumburg* and *Munson*, and a restriction based on a sliding scale in *Riley*.[9] The same reasoning applies if the laws at issue in those cases had used an 85 percent limit on fees – the threshold that petitioner, in effect, advocates here.[10]

Petitioner's denial that it is seeking to impose a percentage-based fee limit rings hollow, and its proposed cure runs afoul of the second basic First Amendment rule cited above – that the government cannot compel fundraisers to disclose the amount of their fees. Illinois responds that it is not seeking to compel disclosure of the proportion of donations devoted to

[9]Under the regulatory scheme a 20 percent fundraising fee was presumed to be reasonable, a fee of 20 to 35 percent was considered unreasonable unless the solicitation involved "dissemination of information, discussion, or advocacy relating to public issues" and a fee above 35 percent was presumed unreasonable unless the fundraiser could justify it. *Riley*, 487 U.S. at 785 (quotation omitted).

[10]This was made clear in *Munson*, 467 U.S. at 967 n.15, for example, where the Court noted numerous state-approved exemptions for charities with fundraising costs that ranged as high as 80 to 85 percent. Such examples illustrate the "tenuous connection between low fundraising costs and a valid charitable endeavor." *Id.*

fundraising expenses, but instead seeks only to combat "the false impression created by what Respondents *did* say." Pet. Br. 44 (emphasis in original). This, however, is nothing but a semantic dodge; the state is seeking to impose criminal penalties on the respondent because, it claims, failure to disclose the percentage of fees it retained constitutes an "implied misrepresentation."

Under petitioner's proposed rule of law, a professional fundraiser that describes any of the charitable purposes to which donations will be devoted is subject to a fraud prosecution if it does not fully disclose how much money is used for administration and other expenses. *See, e.g.*, Pet. Br. 45 ("[t]he fact that Respondents kept 85 percent of all donations * * * constitutes evidence of the truth concealed by the misrepresentations"). By the state's reasoning, non-disclosure is the legal equivalent of misrepresentation unless the fundraiser says nothing at all about the charitable programs for which it is soliciting contributions. *See* Pet. Br. 46 ("once a fundraiser chooses to disclose certain facts about the use of donations, it cannot withhold other facts").

This standard creates a dilemma for professional fundraisers. Those with fees that are "too high" by some undefined standard acquire an obligation to disclose the proportion of proceeds devoted to fundraising, or else they face allegations of "constructive fraud." While petitioner makes quite clear its belief that respondent's fees were "too high," the state offers no way for a solicitor to determine what level of fees does not require full disclosure. In practical effect, Illinois would force charities to choose between their right to determine for themselves how to pay for solicitation drives and their First Amendment immunity from compelled speech.

But such an obligation is precisely what this Court in *Riley* said government could not require. Notwithstanding petitioner's strained analogy to defamation law and its claim that false statements of fact are unprotected speech, Pet. Br. 30, *Riley* stands for the proposition that the percentage of fees retained by a professional fundraiser is exactly the type of "fact" that the state cannot coerce. *Riley*, 487 U.S. at 797 (cases invalidating compelled speech "cannot be distinguished simply because they involved compelled statements of opinion while we deal with compelled statements of 'fact'"). It may well be, as the state maintains, that "how donations are used is often the most important factor in a person's decision to make a gift," Pet. Br. 10, but the *Riley* Court held that "a law compelling its disclosure would clearly and substantially burden * * * protected speech." *Id.* at 798. The state in *Riley* had sought to compel the disclosure of expenses devoted to fundraising to serve the very same interest identified here – "to dispel the alleged misperception that the money [people] give to professional fundraisers goes in greater-than-actual proportion to benefit charity." Nevertheless, this Court invalidated the requirement even though it understood the "factual information might be relevant to the listener, and * * * could encourage or discourage the listener from making a political donation." *Id.*

Lower courts have been equally skeptical of governmental efforts to curb fraud by requiring the disclosure of fundraising expenses. Courts have struck down requirements compelling disclosure of how collected funds are used;[11]

[11] *See, e.g., Texas State Troopers Ass'n. v. Morales*, 10 F. Supp. 2d 628, 632-634 (N.D. Tex. 1998) (invalidating required disclosure of amount retained by fundraiser when charity receives less than 90 percent of funds collected); *Indiana Voluntary*

limits on the compensation paid to professional solicitors;[12] a criminal fraud law compelling disclosure of the percentage of contributions remitted to a charity;[13] and a statute requiring fundraisers to submit solicitation scripts for governmental review.[14] The attempt by Illinois in this case to use the law

Firemen's Ass'n v. Pearson, 700 F. Supp. 421, 442-447 (S.D. Ind. 1988) (invalidating statute requiring disclosures of fundraisers' fee arrangements with charities); *Maine v. Events Int'l, Inc.*, 528 A.2d 458, 461-62 (Me. 1987) (striking requirement that solicitor disclose allocation of contributions when less than 70 percent of funds are expended for charitable program services), *cert. denied*, 487 U.S. 1234 (1988).

[12] *See, e.g., Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 151-54 (1st Cir. 1987) (invalidating statute prohibiting professional solicitors from receiving compensation in excess of 20 percent of total funds raised); *Bellotti v. Telco Communications, Inc.*, 650 F. Supp. 149, 151-153 (D. Mass. 1986) (striking down cap on compensation professional fundraisers may receive), *aff'd*, 824 F.2d 150 (1st Cir. 1987); *Heritage Publ'g Co. v. Fishman*, 634 F. Supp. 1489, 1503-05 (D. Minn. 1986) (enjoining enforcement of statute limiting amount charities can spend on management, general costs, and fundraising costs). *See also Gospel Missions of Am. v. City of Los Angeles*, 298 F.3d 1099, 1106-07 (9th Cir. 2002) (vacating district court's holding on constitutionality of information card that based endorsement of solicitors on percentage of funds paid as expenses).

[13] *People v. French*, 762 P.2d 1369, 1374-75 (Colo. 1988) (holding unconstitutionally overbroad criminal statute that compelled fundraisers who charged fees in excess of 50 percent of funds collected to disclose that charities received less than half of contributions).

[14] *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1232-34 (4th Cir. 1989) (invalidating as prior restraint on speech

of fraud to coerce "high cost" solicitors to disclose their fees cuts against the grain of this well-established body of law.

B. The State's Case-By-Case Approach Does Not Reduce Constitutional Concerns

Petitioner seeks to avoid the clear First Amendment limits on the regulation of charitable solicitations by arguing that an individual fraud prosecution like the one brought against respondent is the type of narrowly tailored approach this Court endorsed in *Schaumburg*, *Munson* and *Riley*. Pet. Br. 23-30. But the state confuses its ability to prosecute fraud with its discretion within constitutional bounds to define what constitutes fraud. Here, Illinois has proposed a definition of "constructive fraud" in an effort to criminalize precisely the types of activities this Court has held to be constitutionally protected, and its case-by-case approach does not cure the problem.

Under the standard petitioner advocates, the state could follow a policy of prosecuting any solicitor who retained 85 percent of donations received (or some other arbitrary amount) if the fundraiser failed to disclose the proportion of the proceeds devoted to the charitable program. By the threat of prosecution, the state could achieve exactly the same outcome that is forbidden by this Court's holdings in *Riley*, *Munson*, and *Schaumburg*. Indeed, the state could initiate action against any charity that spent more than 25 percent of proceeds on fundraising expenses and did not disclose that fact in direct contravention of this Court's holdings in *Schaumburg* and *Munson*. Or, it could base its prosecutorial

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law requiring professional solicitors to submit scripts of oral solicitations to government agency), *cert. denied*, 495 U.S. 904 (1990).

decisions on a more flexible schedule of fundraising costs, contrary to the decision in *Riley*.

To be safe, solicitors would be compelled either to slash their fees to a level prosecutors deem acceptable or affirmatively divulge the details on how donations are spent. Even then, no solicitor could ever be completely free of fear from the government, for, as explained in more detail below, the standard for fraud advocated by the state – "what the public reasonably understood by Respondents' representations," Pet. Br. 42 – is incapable of precise application. Such a standard vests public officials with unbounded discretion to persecute unpopular causes. *See infra* 22-26. In this case, it is not the legal tool of fraud prosecutions that raises constitutional concerns; it is the range of situations to which that tool could be applied under petitioner's "constructive fraud" theory.

Contrary to petitioner's claims, imposing such a rule through common law and case-by-case application does not avoid the constitutional defects of the measures struck down in earlier cases. Since *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931), it has been the law that "in passing upon constitutional questions the court has regard to substance and not to mere matters of form," and that any state restriction on speech "must be tested by its operation and effect." *See also Schneider v. State*, 308 U.S. at 161 ("courts should * * * examine the effect of the challenged legislation"); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("The test is not the form in which state power has been applied but * * * whether such power has in fact been exercised.") (citation omitted).

In *Near*, the Court examined a state law that permitted public authorities to bring the publisher of a newspaper or

other periodical before a judge on a charge of publishing scandalous and defamatory matter. Once a prima facie case of "nuisance" was made, the publisher was required to show that his publication was true and published with good motives and for justifiable ends, or face an injunction. The Court described this as the "essence of censorship" even though the law called for such proceedings to be conducted case-by-case and the state was first required to make its case. 283 U.S. at 713. A similar principle was articulated in *New York Times Co. v. Sullivan*, 376 U.S. at 277-278 (1964) (First Amendment limits tort claims because of their impact on protected speech, and the "state rule of law is not saved by its allowance of the defense of truth").[15]

The same principles preclude Illinois from manipulating its law of fraud to achieve a result that could not be imposed by direct regulation. As this Court emphasized in *Munson*, 467 U.S. at 969, "whether the statute regulates before- or after-the-fact makes little difference." The "chill on the protected activity is the same" regardless whether the charity "is prevented from engaging in First Amendment activity by the lack of a solicitation permit or by the knowledge that its fundraising activity is illegal if it cannot satisfy the

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[15]This Court should reject petitioner's invitation to superimpose the "opinion-fact" analysis of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) in this context, *see* Pet. Br. 32-35, because petitioner's "constructive fraud" standard cannot be applied without giving the government too much latitude to restrict speech. *See infra* 22-26. It has been observed that "[n]o task undertaken under the law of defamation is more elusive than distinguishing between fact and opinion," Robert D. Sack, SACK ON DEFAMATION § 4.1 (3d ed. 2002), and an attempt to apply the analysis in the context of charitable solicitations cannot be reconciled with *Schaumburg*, *Munson* and *Riley*.

percentage limitation." *Id.* It is also no answer that "standards for determining reasonable fundraising fees will be judicially defined" through cases such as the prosecution of respondent. *See Riley*, 487 U.S. at 793 (citation and internal quote omitted). "Speakers * * * cannot be made to wait for 'years' before being able to speak with a measure of security." *Id.* at 793-794.

Upholding the established constitutional norm will not impair prosecutions in cases of actual misrepresentation, nor will it require the states to "sit idly by and allow their citizens to be defrauded." *Id.* at 795. Law enforcement officials at both the federal and state levels have had – and will continue to have – the unfettered ability to prosecute schemes to induce donations by promising prizes or services that never materialize,[16] misrepresenting solicitors' identities and charitable programs,[17] or using faux charitable causes for personal financial gain.[18] But expanding the definition of fraud to include nondisclosure of high solicitation fees – as petitioner advocates here – is not necessary to preserve the

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[16]*See, e.g., United States v. Ciccone*, 219 F.3d 1078, 1080 (9th Cir. 2000); *United States v. Kinney*, 211 F.3d 13, 16 (2nd Cir. 2000), *cert. denied*, 531 U.S. 1079 (2001); *United States v. McDaniel*, 1998 WL 792291 at *1 (9th Cir. Nov. 13, 1998) (unpublished opinion); *United States v. Smith*, 133 F.3d 737, 741 (10th Cir. 1997), *cert. denied*, 524 U.S. 920 (1998).

[17]*See, e.g., Kinney*, 211 F.3d at 16 (2000).

[18]*See, e.g., People v. Knippenberg*, 757 N.E.2d 667, 670 (Ill. App. Ct. 2001); *United States v. Bennett*, 9 F. Supp. 2d 513, 517-518 (E.D. Pa.) *aff'd*, 161 F.3d 171 (3d Cir. 1998), *cert. denied*, 528 U.S. 819 (1999).

government's interest in effective law enforcement,[19] and, for the reasons described above, would undermine important constitutional principles.

C. The State Cannot Reduce the Level of Constitutional Protection Accorded to Professional Solicitors

The principal thrust of petitioner's complaint is that Telemarketing Associate's appeal for funds was fraudulent because of the for-profit nature of its business. *See, e.g.*, Pet. Br. 4 ("they did not state that they were for-profit fundraisers"). However, it appears petitioner's real concern is the fact that VietNow, the charity that received donated funds from the respondent, devoted too little of the proceeds to its various programs.[20] Nevertheless, the state directed its legal attack against Telemarketing Associates, the for-profit entity that all parties admit faithfully performed the terms of its contract. Petitioner and its supporting amici assume that

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[19]Contrary to the position taken by federal amici in this case, the FTC has not historically embraced the notion that non-disclosure of fees paid to fundraisers is an unfair or deceptive trade practice, but has focused instead on affirmative misrepresentations. *See, e.g., FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1169-70 (9th Cir. 1996); *FTC v. Saja*, 1997 WL 703399 at *1 (D. Ariz. Oct. 7, 1997); *FTC v. NCH, Inc.*, 1995 WL 623260 at *1-5 (D. Nev. May 25, 1995); *Civic Dev. Group, Inc.*, Consent Order, 125 F.T.C. 958, 959-60 (1998); *King Distrib. Co.*, Consent Order, 71 F.T.C. 1300 (1967); *National Trade Publications Serv., Inc.*, Order, 58 F.T.C. 706 (1961), *aff'd, National Trade Publications Serv. v. FTC*, 300 F.2d 790 (8th Cir. 1962).

[20]*See* Pet. Br. 24 n.21. The state cites figures from VietNow's IRS Form 990 to show the extent of funds that were devoted to program services.

they have greater ability to prosecute in this situation simply because the charity engaged a professional fundraiser.[21]

This assumption, however, is plainly wrong. It is well settled that a speaker does not forfeit constitutional immunity because he or she was paid to speak. *New York Times*, 376 U.S. at 266. The petitioner's argument misses the point of this Court's holdings in *Schaumburg*, *Munson* and *Riley*, which made clear that professional fundraisers have "an independent First Amendment interest in the speech, even though payment is received." *Riley*, 487 U.S. at 794 n.8; *Munson*, 467 U.S. at 955 n.6; *Schaumburg*, 444 U.S. at 631-633. The state's attempt to use its fraud statute to "reform" charitable solicitations is "little more than a variation of the argument rejected in *Schaumburg and Munson* that [the government's effort] is simply an economic regulation with no First Amendment implication." *Riley*, 487 U.S. at 790. It assumes incorrectly that the state has a greater interest in preventing fraud where a professional solicitor is involved. But as this Court emphasized in *Munson*, 467 U.S. 968 n.16, "[i]t is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity than it is for the charity to engage in that activity itself." Ultimately, regulations that have the effect of discriminating between non- and for-profit solicitors are unconstitutional. *Riley*, 487 U.S. at 799-800.

In this regard, it is significant that the state is seeking to regulate speech rather than use other means at its disposal to

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[21]Similarly, the new FTC rules cited by the federal amici assume that the federal government may restrict certain telemarketing practices when non-profit entities engage for-profit call centers, but that the same calls are exempt from regulation when made by the non-profit organizations themselves. Fed. Br. 2.

protect Illinois residents. The state could simply inform its citizens of the uses to which VietNow devotes donated funds, since it has access to all the relevant information. *See* Pet. Br. 24 n.21. Such an approach to preventing fraud "may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses." *Schaumburg*, 444 U.S. at 638. But it is unconstitutional for the state to seek to impose criminal liability on the professional fundraiser for what it believes to be the unwise policies of the charity that hired it.

II. THE STANDARD ADVOCATED BY ILLINOIS WOULD GIVE GOVERNMENT UNBOUNDED DISCRETION TO BRING PROSECUTIONS AND WOULD CHILL PROTECTED SPEECH

Petitioner's claim that its use of individual prosecutions as a narrowly-tailored solution to the problem of fraudulent solicitation fails to account for the breadth of the substantive legal standard it asks this Court to approve. Its definition of "constructive fraud" or "implied misrepresentation" would permit the state to prosecute solicitors in the same situations that this Court held are constitutionally protected in *Schaumburg*, *Munson* and *Riley*. Worse, however, prosecutors would not be bound by any statutory limits, but would have unrestricted license to pursue "fraud" whenever they believe a fundraiser's fee is excessive in relation to any statement of charitable purposes.

The state appears to understand the extent to which it is seeking a relaxation of constitutional norms and asks this Court to give it greater latitude in which to accomplish its purported purpose. It suggests, for example, that the First Amendment does not require the elimination of "*any*

possibility of civil or criminal liability being imposed" on protected speech. Pet Br. 25 (emphasis in original). Petitioner argues that it need not propose "mathematically precise definitions," and that the First Amendment does not require the standard to be "narrowed with a 'buffer zone'" to give "breathing room" for questionable speech. *Id.* 27, 31. It should have more ability to prosecute, the state claims, because the speech (and/or the failure to disclose) at issue is speech "bordering on actual fraud." *Id.* 37. *See also* State Br. 13 (asking Court to reconsider *Riley*).

Petitioner's remarkable request for this Court to approve such an elastic standard ignores "the First Amendment's command that government regulation of speech must be measured in minimums, not maximums." *Riley*, 487 U.S. at 790. Petitioners seek to revive "the paternalistic premise," repeatedly rejected by this Court, "that charities' speech must be regulated for their own benefit." But the First Amendment "mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 790-791. The lax standard petitioner seeks violates these basic principles.

A. The State's Proposed Standard for "Constructive Fraud" by Charitable Solicitors Permits Excessive Prosecutorial Discretion

Petitioner asks this Court to classify as unprotected speech "implied misrepresentations," which it claims encompasses the failure to disclose fundraising costs in any charitable solicitation where it considers the fees to be too high. Not only would such a standard undermine this Court's longstanding precedents governing charitable solicitations, but the proposed standard for "constructive fraud" is incapable of precise application.

Noting that this Court in *Riley* held that local governments could not base their regulation of charitable solicitation on the "reasonableness" of the fee, Illinois has proposed a variation: The touchstone for implied misrepresentation is "what the public reasonably understood" about how much of their donations would be devoted to charitable programs. Pet. Br. 42. Thus, while state and local governments cannot draft laws to set a percentage for what constitutes a "reasonable" fee, petitioner claims it is permissible for the public (speaking through the attorney general) to determine "reasonableness" on an ad hoc basis. Whereas solicitors seeking to comply with the ordinances struck down in the previous cases could be certain of compliance if they adhered to the prescribed percentages governing acceptable fees, the state here is seeking constitutional authority to prosecute based on what it describes as "almost infinite variations of human language." Pet. Br. 21. *See also* Federal Br. 23 (no "affirmative misrepresentation" is needed in order to impose liability for "implicit misrepresentation").

Petitioner's efforts to distinguish *Schaumburg*, *Munson*, and *Riley* merely reveal why its approach is even less constitutional than the ordinances at issue in those cases. There, a solicitor would at least know if it was in compliance with the law, even if the percentage-based standards infringed their rights. Here, however, a solicitor could never be certain when its fees might be considered "excessive" by the attorney general so as to require disclosure of the amount of its fee.[22]

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[22]The state amici, who ask this Court to overrule its past precedents, illustrate the extent to which they are seeking wide latitude to prosecute fundraisers and/or charities that they believe spend too much on fundraising. *See* State Br. 5 n.1 (citing examples of "excessive" fundraising fees ranging from 54.4 percent to over 80 percent).

It is no answer for petitioner to assert that the concept of "misrepresentation" is well-defined in the common law of fraud and that questions can be resolved through judicial construction. Pet. Br. 28. The standard would give local prosecutors virtually unlimited discretion to prosecute charitable solicitors in the first instance based on their perception that too much is being spent on fundraising.

For this reason, the Court has cautioned against regulating fundraisers "with the heavy hand that unbridled discretion allows" because it "affects the speech of the clients or causes with which they are associated." *Riley*, 487 U.S. at 801 n.13; *Munson*, 467 U.S. at 964 n.12 (charities cannot be forced to trade direct regulation of their speech for a scheme in which official has "unguided discretion"). This principle applies equally to laws involving the licensing of speech, as in *Munson* or *Riley*, and to situations like this case, where the risk comes from the prospect of discriminatory enforcement. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1050 (1991); *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-573 (1974). Here, the virtually limitless discretion the state would enjoy is fraught with "potential for abuse [inherent in] open-ended grant[s] of discretion" and is thus inconsistent with the rule that "reliance upon official discretion in any significant degree would clearly run afoul" of established case law. *Schaumburg*, 444 U.S. at 642-43 & n.1 (Rehnquist, J., dissenting).

Petitioner's proposed "implied misrepresentation" standard is particularly threatening to "small or unpopular charities" who typically have higher fundraising costs "due to the difficulty of attracting donors" or because they must expend more resources getting their message out. *Riley*, 487 U.S. at 793-794. However, this Court has held that the First

Amendment precludes measures which "furnish[] a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Kolender*, 461 U.S. at 360 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)). Petitioner's proposed expansion of the state's law governing fraud in charitable solicitations would allow the government "unconstitutional discretion in its enforcement." *City of Houston v. Hill*, 482 U.S. 451, 467 (1987) ("Far from providing the 'breathing space' that First Amendment freedoms need to survive * * * the ordinance is susceptible of regular application to protected expression."), quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Petitioner's stated interest in prosecuting certain fundraisers whose fees presumably are too high in order to reduce "mounting public cynicism about *all* charities," Pet. Br. 39 (emphasis in original), only adds to this concern. By dividing the world into favored and disfavored solicitors, petitioner's approach increases the likelihood that the law will be used to "restrict First Amendment activity that results in high costs but is itself part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular." *Munson*, 467 U.S. at 967. It also "necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers." *Riley*, 487 U.S. at 799. Indeed, such an imprecise standard may actually encourage discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality op.). Accordingly, this Court should reject petitioner's proposed constitutional rule.

B. The Proposed Rule of Law Would Significantly Chill Protected Speech

The state's avowed purpose in this case is to compel charities to spend less on solicitation costs or else to disclose those costs, or both. Petitioners assertion that prosecutions for "implied misrepresentations" based on the amount of the solicitor's fee will not deter "legitimate speech," Pet. Br. 35-37, is based on the mistaken premise that solicitations are "legitimate" only if the fees are low or the amount of the fee is disclosed. This assumption, however, flatly contradicts this Court's holding in *Riley*, which made clear that compelling such disclosures would impose a significant burden on protected speech.

This Court emphasized that such a requirement would encourage professional fundraisers either "to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure." *Riley*, 487 U.S. at 800. The impact would be particularly pronounced in the case of professional teleservices fundraisers:

> [I]f the potential donor is unhappy with the disclosed percentage, the fundraiser will likely not be given a chance to explain the figure; the disclosure will be the last words spoken as the donor * * * hangs up the phone.

Id. The Court noted that such a legal regime necessarily would discriminate against professional solicitors compared to charities that use their own employees or volunteers. Accordingly, such a legal regime "will almost certainly hamper the legitimate efforts of professional fundraisers to raise money." *Id.* at 799.

The effect of such a legal requirement is the same, regardless whether it is imposed by ordinance or by common

law rule. Here, the state is quite clear about its intention to require full disclosure if the solicitor says anything at all about the charitable program.[23] Such a requirement would impose a direct chill on protected speech, contrary to this Court's holding in *Riley*.

CONCLUSION

For the foregoing reasons, and for those set forth in the respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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[23] Pet. Br. 48 (comparing its proposed standard to "disclosure obligation" of federal lobbying regulations). Federal amici acknowledge and support the coercive effect of the state's proposed constitutional standard. *See* Fed. Br. 10 ("the potential for fraud liability is only likely to cause [solicitors] to provide more complete information"); 27 ("the potential for fraud liability should * * * result in more speech rather than less").